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No. 79-1746

In the Supreme Court of the United States

OCTOBER TERM, 1979

JOHN B. KILROY, SR., PETITIONER

v.

DOUGLAS M. COSTLE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A4) is reported at 614 F. 2d 225. The opinion of the district court (Pet. App. B1-B24) is reported at 440 F. Supp. 316.

JURISDICTION

The judgment of the court of appeals was entered on February 25, 1980. The petition for certiorari was filed on May 3, 1980. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court properly denied a preliminary injunction to prevent EPA from enforcing a compliance schedule without preparation of an environmental impact statement.

STATUTES INVOLVED

Pertinent portions of 33 U.S.C. 1371(c)(1) and 42 U.S.C. 4332(2)(C) are set out at pages 3 and 4 of the petition.

STATEMENT

This is yet another effort by petitioner to defeat a project once proposed by the City of Los Angeles to curtail sewage-sludge discharges into the Pacific Ocean. In *Costle* v. *Pacific Legal Foundation*, No. 78-1472 (Mar. 18, 1980), petitioner and others—ultimately without success sought to defeat the project by invalidating an NPDES permit on the ground that it was issued in violation of the public-participation requirements of the Clean Water Act, 33 U.S.C. (and Supp. II) 1251 *et seq.* In the present case, petitioner (represented by Pacific Legal Foundation) seeks to invalidate the permit on NEPA grounds.

The background is the same as in *Costle*. The City of Los Angeles owns and operates the Hyperion Wastewater Treatment Plant located in Playa Del Ray, California. Since 1960, that plant has processed most of the City's sewage, and discharged the wastes through three "outfalls" into the Pacific Ocean. Under Section 402 of the Clean Water Act, 33 U.S.C. (and Supp. II) 1342, EPA and the State of California Regional Water Quality Control Board have issued a series of permits allowing the City to discharge wastes from this plant into the Pacific Ocean. One such permit, issued on August 18, 1975,

conditioned continuing discharges from the Hyperion Plant on compliance by the City with a schedule designed to achieve full secondary treatment[1] of wastewater by October 1, 1979, and the gradual elimination of the discharge of sludge into the ocean over a 30-month period following "concept approval" of a plan for alternative disposal of the sludge. On January 24, 1977, the expiration date of the permit was extended to June 30, 1977, and on June 2, 1977, the expiration date was extended to December 17, 1979. See *Costle* v. *Pacific Legal Foundation*, *supra*, slip op. 6-12.[2]

The permit, as extended, required the City to phase out sludge discharges into the ocean. The permit also set interim compliance dates for completion of the plans and specifications and commencement of construction of interim sludge-handling facilities (see Pet. 5-6 n.1). The permit, however, left to the City the nature and details of the interim project.

On February 4, 1977, petitioner, the Pacific Legal Foundation, and others sued EPA, the State Water Resources Control Board, and other state and federal

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[1]"Primary treatment" of sewage includes relatively simple processes, such as settling solids out of the sewage, screening out floatable objects, and removing oil and grease. "Secondary treatment" removes a higher percentage of solids by methods such as anaerobic digestion. Pursuant to Section 301(b)(1)(B) of the Clean Water Act, 33 U.S.C. 1311(b)(1)(B), publicly owned treatment plants were generally required to achieve effluent limitations "based on secondary treatment" by July 1, 1977. See *Costle* v. *Pacific Legal Foundation*, *supra*, slip op. 2-3.

[2]In that case, the Ninth Circuit found procedural errors in the June 2, 1977, extension of the permit. As a result, the court stayed the compliance schedules incorporated in the permit, though leaving in effect those requirements which were in effect on January 1, 1977. See 586 F. 2d 650. This Court reversed in *Costle* v. *Pacific Legal Foundation*, *supra*.

defendants to enjoin the interim sludge project on the ground that EPA should have prepared an environmental impact statement before requiring the construction of an interim sludge project. On March 29, 1977, the plaintiffs filed a motion for a preliminary injunction to enjoin EPA "from funding, requiring, directing implementation of, or otherwise participating in the Interim Hyperion Sludge Management Project" without first preparing an environmental impact statement. They also sought the same relief against "all persons to whom knowledge of this injunction shall come * * *." On April 18, 1977, the EPA voluntarily agreed to prepare an EIS before funding the interim project (Pet. App. C1-C5), but EPA refused to eliminate the requirement in the permit that Los Angeles construct interim sludge-handling facilities in accordance with the specified schedule. As for all aspects other than funding, the district court denied an injunction (Pet. App. B1-B24). The court found that Section 511(c) of the Clean Water Act, 33 U.S.C. 1371(c), expressly exempts NPDES permits from the requirement of an EIS and, therefore, EPA may properly require the City to carry out an interim sludge-disposal project without first preparing an EIS (Pet. App. B6-B7).[3] The court of appeals affirmed (Pet. App. A1-A4).

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[3]The plaintiffs had also sought a preliminary injunction against EPA's policy to eliminate the disposal of sludge in the ocean. The court found that Section 301 of the Act, 33 U.S.C. (and Supp. II) 1311, applies to sewage treatment plants discharging into the contiguous zone, and that all such plants are subject to at least secondary treatment under the Act. The court denied an injunction (Pet. App. B8-B24).

On October 14, 1977, the petitioners filed a motion requesting the district court to reconsider its denial of the preliminary injunction. After briefing, the district court affirmed its previous decision.

ARGUMENT

The decision of the court of appeals is correct and is not in conflict with any decision of another court of appeals or of this Court. In addition, a pending settlement of the government's enforcement action against the City of Los Angeles has eclipsed whatever significance this case might otherwise have had.

1. Section 511(c)(1) of the Clean Water Act, 33 U.S.C. 1371(c)(1), states that, with the exception of grants for the construction of public treatment works and the issuance of NPDES permits for new sources, "no action of the Administrator taken [under the Act] shall be deemed a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969." Plainly, the conditions in the NPDES permit requiring the City of Los Angeles to phase out the discharge of sewage sludge into the Pacific Ocean were neither a grant for a treatment works nor a permit for the discharge from a new source. Accordingly, no EIS was required for those conditions.

The NPDES permit also required the City to adhere to a schedule for the construction of interim sludge handling facilities (Pet. 5-6 n.1). That schedule merely required that some facilities be constructed in accordance with the schedule as a means of assuring prompt compliance with the prescribed schedule. Once again, under the language of Section 511(c), the construction schedule for the carrying out the interim project does not require the preparation of an EIS because it is neither a grant nor a new-source permit.

One purpose of the broad exemption in Section 511(c) was to assure that the deadlines set out in the Clean Water Act would not be delayed by the time required to

prepare and consider environmental impact statements. The Conference Committee Report on the Federal Water Pollution Control Act Amendment of 1972 stated:[4]

> The sole purpose of the Act is the enhancement of environmental quality. In the administration of the Act, EPA will be required to establish numerous guidelines, standards and limitations. With respect to each of these actions, the Act provides Congressional guidance to the Administrator in as much detail as could be contrived. Virtually every action required of the Administrator by the Act, however, involves some degree of agency discretion, judgments involving a complex balancing of factors that include technological considerations, economic considerations, and others. The Act seeks to guide the Administrator, to the extent possible, in the matter of assigning relative weight to the many factors that he must consider.
>
> If the actions of the Administrator under this Act were subject to the requirements of NEPA, administration of the Act would be greatly impeded.

With regard to publicly owned treatment works, Section 301(b)(1)(B) set July 1, 1977, as the deadline for the achievement of secondary-treatment standards. The discharge of sludge by the City of Los Angles violates the secondary-treatment requirement and should have ended by July 1, 1977. See 40 C.F.R. 133.102.[5] Preparation of

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[4]Senate Comm. on Public Works, 93d Cong., 1st Sess., *A Legislative History of the Water Pollution Control Act Amendments of 1972*, at 332 (Comm. Print 1973).

[5]Sludge violates the component limitations of the secondary-treatment regulations.

an EIS prior to the phasing out of that discharge would have had the effect of delaying the congressionally mandated deadline and was therefore not required.[6]

To be sure, in Section 511(c) Congress prescribed an EIS prior to federal funding of any publicly owned treatment works. But EPA was authorized to require the City to obey the compliance schedule without regard to whether EPA would fund the interim sludge project or any other project. EPA's decision to do so in this case was not a funding decision. It was simply an imposition of permit conditions. Section 511(c) could not be clearer that no EIS was required. See *State Water Control Board* v. *Train*, 559 F. 2d 921, 924 (4th Cir. 1977).

Petitioner contends (Pet. 8-10) that between the decision below and this Court's decision in *Costle*, he has been deprived of any opportunity to be heard concerning the environmental consequences of gradually reducing sludge discharges into the ocean and disposing them in landfills. This is not so. Although the 1975 permit did not identify the precise way in which the City would choose to discontinue its sludge discharges, EPA invited public

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[6]In the 1977 Amendments to the Clean Water Act, Congress made a time extension possible under limited circumstances. The 1977 statute added Section 301(i), 91 Stat. 1584-1586, 33 U.S.C. (Supp. II) 1311(i), which allows an extension of the deadline if construction of a project was impossible by July 1, 1977, or if federal funds were not available for a timely construction. The 1977 Amendments also added a new Section 301(h), 91 Stat. 1584, 33 U.S.C. (Supp. II) 1311(h). That section allows the Administration to issue an NPDES permit modifying secondary-treatment standards for marine discharges if certain strict conditions are met.

comment in 1975 on its proposal to require the City to adopt some means to phase out sludge discharges. Petitioner did not, however, object at that time.[7]

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[7]As this Court observed in *Costle* (slip op. 18-19):

> It is undisputed that the most controversial aspects of the Hyperion permit—the compliance schedule for secondary treatment, the "sludge-out" requirement, and the resultant requirement that the city develop an alternative method of sludge disposal—were all included within the 1975 permit. That permit was issued following EPA publication of advance notice of its tentative determination to revise the initial 1974 permit, and a hearing on the proposed revisions. None of the respondents objected to the issuance of the 1975 permit or requested an adjudicatory hearing. We agree with the position advanced by petitioner that respondents may not reopen consideration of substantive conditions contained within the 1975 permit through hearing requests relating to a proposed permit modification that did not even purport to affect those conditions.
>
> The EPA's determination to modify the 1975 permit by extending its expiration date to December 17, 1979, was made following newspaper publication of the proposed action, including notice of an opportunity for submission of comments and hearing requests. Respondent Los Angeles received an individual notice of the EPA's tentative determination to extend the permit, and raised no objection. Respondents PLF and Kilroy, who argue that the EPA was aware of their interest in the Hyperion permit and their opposition to the Interim Sludge Disposal Project, could have received such individual notice if they had asked to be placed on the EPA's mailing list for notices of proposed agency actions within the pertinent geographical area. 40 C.F.R. §125.32(a)(3). They made no such request. Under the circumstances, we think it reasonable that the Regional Administrator decided to extend the expiration date of the permit without another public hearing, on the grounds that the public had not exhibited a significant degree of interest in the action under consideration, and that information pertinent to such a decision would not have been adduced if a hearing had been held. This simply is not a case in which doubt existed concerning the need for a hearing.

2. Subsequent events have all but mooted this case. Under the 1975 time schedule the interim project should have been completed by 1978. Because of the stay of that schedule by the Ninth Circuit in *Costle*, however, the interim project was never built. Furthermore, since the *Costle* decision, the United States and the City of Los Angeles have entered into a settlement of the government's enforcement suit in *United States* v. *Los Angeles*, No. CV 77-3047-HP (C.D. Cal.). Subject to approval by the district court, the government agreed that it will not enforce the sludge-out requirement until July 1, 1985. It is anticipated that this new deadline for enforcement will permit a completely different method for the disposal of the City's sewage (see Br. in Opp. of State of California at 3).[8]

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[8]The consent decree itself (in paragraphs VI, VII, and VIII) evidences the City's abandonment of the interim-sludge project in favor of the Hyperson Energy Recovery System. As PLF and Kilroy stated in their petition for rehearing in *Costle* (at 4), "[t]his project does not involve the trucking and dumping operations to which Kilroy objects."

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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